On direct appeal to the California Court of Appeal, Ramirez raised one claim – that the trial court failed to properly consider all relevant factors when declining to dismiss the prior strike conviction findings. The California Court of Appeal rejected Ramirez's claim and affirmed the judgment, concluding that the trial court did not abuse its discretion in refusing to dismiss one or more of the prior strike conviction findings. App. J at 48-51. Ramirez filed a petition for review, reasserting the same claim, and the California Supreme Court denied review without comment or citation.

On April 4, 2000, Ramirez filed in federal court a post-Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") petition for writ of habeas corpus under 28 U.S.C. § 2254. The magistrate judge issued a report and recommendation finding the sole issue raised in the petition, namely that the trial court abused its discretion and violated due process when it refused to dismiss one of Ramirez's prior strike convictions, did not merit habeas relief. The magistrate judge concluded that Ramirez's challenge to the California Court of Appeal's application of California sentencing law did not present a federal question and, even if the claim was cognizable, the due process objection was without merit because the California Court of Appeal's determination that the trial court did not abuse its discretion when it rejected Ramirez's request to dismiss one or more of his prior strike conviction findings, was neither contrary to nor an unreasonable application of federal law. App. I at 41-43. Accepting and adopting the magistrate judge's findings and recommendations, the district judge denied Ramirez's petition for writ of habeas corpus. App. G at 33; App. H at 34-35. The district judge also denied Ramirez's application for a certificate of appealability regarding the same due process claim. App. F at 31-32.

Ramirez subsequently filed a request with the Ninth Circuit seeking a certificate of appealability on his due process claim. App. E at 24-30. On November 13, 2001, the Ninth Circuit

granted a certificate of appealability, but not on the due process claim that Ramirez presented to the court. App. D at 21. The Ninth Circuit identified a new, alternative claim under the Eighth Amendment that had not been previously asserted by Ramirez at any time in state or federal court. Specifically, the Ninth Circuit granted a certificate of appealability on the following issue:

> Does [Ramirez's] sentence of 25 years to life for possession of 0.29 grams (less than 0.01023 ounces) of methamphetamine violate the Eighth Amendment? *See Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., dissenting from denial of certiorari); *see also Andrade v. Attorney General of the State of California*, – F.3d –, 2001 WL 1346065 (9th Cir. Nov. 2, 2001).

App. D at 21.

Recognizing there was no evidence that an Eighth Amendment claim had been exhausted, the Ninth Circuit also certified the following issue:

> Has [Ramirez] exhausted this issue? *See Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984) (exhaustion satisfied if claim presented to highest state court before this court decides the appeal).

App. D at 22.

After the Ninth Circuit's issuance of the certificate of appealability and before briefing was filed on the certified questions, Ramirez presented an Eighth Amendment claim to the California Supreme Court in a petition for writ of habeas corpus. On November 13, 2002, the California Supreme Court denied the petition for writ of habeas corpus without comment or citation.

On May 9, 2005, the Ninth Circuit issued an opinion vacating the district court's judgment and remanding "to the district court for consideration of Ramirez's Eighth Amendment claim under *Reyes v. Brown*, 399 F.3d 964 (9th Cir. 2005)." App. A at 1; App. B at 2-3. In *Reyes v. Brown*, the Ninth Circuit had vacated a denial of a habeas petition asserting an Eighth Amendment claim and remanded to the district court "to develop the record further" and "to determine in the first instance" whether Reyes' Three Strikes sentence violated the Eighth Amendment in a manner akin to the Ninth Circuit's decision in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004). App. C at 15-16.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Ninth Circuit has so far departed from the acceptable and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Contrary to the decisions of this Court and three other circuits (Third, Fifth, and Tenth Circuits), the Ninth Circuit granted a certificate of appealability on a claim that Ramirez had not raised in his prior state or federal court proceedings and did not raise in his request for a certificate of appealability. The Ninth Circuit then vacated the denial of habeas relief and remanded the matter to the district court for consideration of this alternative claim, an Eighth Amendment claim, under *Reyes v. Brown*, 399 F.3d 964. In doing so, the Ninth Circuit also opened the door for Ramirez to develop facts to support this previously unasserted claim even though he had never attempted to do so in state court. The Ninth Circuit's decision violates the fundamental principles of habeas corpus – finality, comity, and the orderly administration of justice.

This Court's intervention is warranted and urgently needed because the Ninth Circuit continues to misunderstand the scope of its authority on habeas review. The Ninth Circuit's recent decisions confirm that the court needs additional guidance

concerning the scope of habeas review. *Kane v. Garcia Espitia*, __ U.S. __, 126 S. Ct. 407 (2005); *Schriro v. Smith*, __ U.S. __, 126 S. Ct. 7 (2005); *Mayle v. Felix*, __ U.S. __, 125 S. Ct. 2562 (2005); *Brown v. Payton*, __ U.S. __, 125 S. Ct. 1432 (2005); *Lockyer v. Andrade*, 538 U.S. 63 (2003). Therefore, this Court should grant certiorari to provide additional guidance on the specific limits of a federal habeas review.

A. The Ninth Circuit Exceeded Its Authority In Granting A Certificate Of Appealability On An Issue That Had Not Been Raised In Prior State Or Federal Court Proceedings

The right to appeal the dismissal of a habeas corpus petition after April 24, 1996 (the effective date of AEDPA) is governed by the requirements found at 28 U.S.C. § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Consequently, under AEDPA, a certificate of appealability may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The showing required to satisfy 28 U.S.C. § 2253(c) is straightforward: the habeas petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. at 483; *see also Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

By granting Ramirez a certificate of appealability on an issue that had not been raised in prior state or federal court proceedings, the Ninth Circuit acted in violation of 28 U.S.C. § 2253 and this Court's decisions. The Ninth Circuit wholly ignored the requirement that a habeas petitioner make a substantial showing of the denial of a constitutional right before a certificate of appealability is issued. Ramirez did not make, and could not have made, this requisite showing because he did not assert an Eighth Amendment violation in the state courts or the district court. In prior state court proceedings and in his

federal habeas corpus petition, Ramirez claimed only that the trial court failed to consider the proper factors when it denied his motion to strike one of his prior convictions. App. F at 31-32; App. H at 34-35; App. I at 41-43; App. J at 48-51. In fact, he did not exhaust the Eighth Amendment claim until well after the Ninth Circuit granted the certificate of appealability. Hence, he could not have made the showing that was necessary for the Ninth Circuit's issuance of a certificate of appealability on an Eighth Amendment issue. The Ninth Circuit, in turn, vacated the judgment of the district court denying Ramirez's petition with prejudice and remanded to litigate the newly-created Eighth Amendment claim. In effect, the Ninth Circuit rewrote Ramirez's habeas petition to include an Eighth Amendment claim. Once again, the Ninth Circuit has departed far from the acceptable and usual course of judicial proceedings and the general practice of federal habeas review. This Court's intervention and guidance is highly warranted and urgently needed.

Furthermore, the Ninth Circuit's issuance of a certificate of appealability on an issue that Ramirez had not asserted in his prior state or federal court proceedings is inconsistent with the decisions of this Court, other panels of the Ninth Circuit, and other circuits. Regarding appellate review, this Court has stated that "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (*citing Hormel v. Helvering*, 312 U.S. 552, 556 (1941)); *see also Thomas v. Arn*, 474 U.S. 140, 148 (1985) (failure to object to magistrate's report and recommendation waived the issue on appeal because the appellate court would be forced to review claims that were never reviewed by the district court). Other panels of the Ninth Circuit have similarly determined that a habeas claim which is not raised in the petition before the district court is not cognizable on appeal. *Belgarde v. Montana*, 123 F.3d 1210, 1216 (9th Cir. 1997); *Cacoperdo v. Demosthenes*, 37 F.3d

504, 507 (9th Cir. 1994). The Third Circuit has also held that a claim not raised in the district court, even though exhausted, was not properly before the court on appeal. *Carpenter v. Vaughn*, 296 F.3d 138, 148 (3rd Cir. 2002). Likewise, the Fifth and Tenth Circuits have held that a contention not raised by a petitioner in district court cannot be considered for the first time on appeal from that court's denial of habeas relief. *Johnson v. Puckett*, 176 F.3d 809, 814 (5th Cir. 1999); *United States v. Smith*, 915 F.2d 959, 964 (5th Cir. 1990); *Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir. 1985), *cert. denied*, 474 U.S. 838 (1985); *see also United States v. Denogean*, 79 F.3d 1010, 1012-13 (10th Cir. 1996). The Tenth Circuit has also ruled that a district court should not assume the role of advocate for a pro se litigant and may not rewrite a petition to include claims which were never presented. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999); *see also Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir. 1998) (an appellate court will not rewrite a habeas petition to include a claim that was never presented to the district court). Hence, the Ninth Circuit has made a decision which conflicts with the decisions of this Court and other federal courts of appeals on an important matter which determines the availability of federal habeas corpus review.

Finally, the Ninth Circuit's decision to grant a certificate of appealability on a claim that Ramirez had not raised in his prior state or federal court proceedings and then vacate the district court's denial of habeas relief violates the fundamental habeas corpus principles of comity, finality, and the orderly administration of justice. In discussing the exhaustion doctrine as it pertains to habeas matters, this Court has explained that "as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act." *Rose v. Lundy*, 455 U.S. 509, 515 (1982); *see also Dretke v. Haley*, 541 U.S. 386, 388 (2004) ("Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally

defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default."); *Woodford v. Garceau*, 538 U.S. 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases [citations], and 'to further the principles of comity, finality, and federalism,' [citation]."); *Carey v. Saffold*, 536 U.S. 214, 220 (2002) ("The exhaustion requirement serves AEDPA's goal of promoting 'comity, finality, and federalism,' [citation], by giving state courts 'the first opportunity to review [the] claim,' and to 'correct' any 'constitutional violation in the first instance.'"); *Williams v. Taylor*, 529 U.S. 420, 436 ("Federal habeas corpus principles must inform and shape the history and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudication and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."). Recently, this Court found the Sixth Circuit erred when it relied on grounds that were apparent from the record but not raised on direct appeal without determining whether the defendant's procedural default could be excused by a showing of cause and prejudice or the need to avoid a miscarriage of justice. *Bradshaw v. Richey*, ___ U.S. ___, 2005 WL 3144332 (November 28, 2005); *see also United States v. Frady*, 456 U.S. 152, 167-68 (1982) (prisoner who fails to raise an issue on direct appeal is procedurally barred from asserting it for the first time on habeas review unless he can demonstrate cause and actual prejudice).

In granting a certificate of appealability on an issue that had not been raised by Ramirez in his prior state or federal court proceedings and then vacating the district court's denial of habeas relief, the Ninth Circuit disregarded all notions of comity, finality, and the orderly administration of justice – the

basic principles of habeas corpus and AEDPA. For these reasons, a writ of certiorari is warranted.

B. The Ninth Circuit Failed To Adhere To The Limits Congress Imposed, Through AEDPA, On Federal Habeas Corpus Review By Allowing A Habeas Petitioner To Develop Facts To Support A Claim When The Petitioner Never Attempted To Develop Those Facts In State Court

The Ninth Circuit vacated the district court's judgment denying habeas relief and remanded the case for consideration of Ramirez's Eighth Amendment claim under *Reyes v. Brown*, 399 F.3d 964,[1/] in which the Ninth Circuit ordered the district court to develop a factual record as to the circumstances underlying the state prisoner's prior strike convictions. This approach directly conflicts with the express provisions of AEDPA and this Court's decisions interpreting AEDPA.

28 U.S.C. § 2254(d)(2) provides in relevant part that a federal habeas court shall not grant a writ on a claim adjudicated in state court unless the adjudication was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(e)(2) provides that if a habeas applicant has failed to develop the factual basis of his claim in state court, the habeas court shall not hold an evidentiary hearing on the claim unless the applicant shows that his claim relies on a new rule of constitutional law or a factual predicate that could not have been previously discovered by exercising due diligence, and shows that the facts underlying his claim constitute clear and convincing evidence that but for a constitutional error, no reasonable fact-finder would have found him guilty of the underlying offense.

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1. The California Attorney General is challenging the *Reyes v. Brown* decision in a separate petition for writ of certiorari to be filed with this Court.

This Court has held that the question of whether a state court's decision was unreasonable must be assessed in light of the record that the state court had before it. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). This Court has also held that 28 U.S.C. § 2254(e)(2) precludes a federal habeas court from holding an evidentiary hearing on a claim if the petitioner failed to develop the factual basis of the claim in state court proceedings. *Williams v. Taylor*, 529 U.S. 420, 430, 432, 435 (2000). Further, this Court has held that a federal habeas court errs if it relies on evidence not properly presented to a state court without first determining whether the habeas petitioner was at fault for failing to develop the factual bases for his claim in state court or whether the petitioner satisfied the exceptions set forth in 28 U.S.C. § 2254(e)(2). *Bradshaw v. Richey*, 546 U.S. __, 2005 WL 3144332.

In the instant matter, the Ninth Circuit vacated the district court's judgment denying habeas relief and remanded the case for consideration of Ramirez's Eighth Amendment claim under *Reyes v. Brown*, 399 F.3d 964. In effect, the Ninth Circuit ordered the district court to develop a factual record as to the circumstances underlying Ramirez's prior strike convictions. The record fails to show, however, that Ramirez ever sought to develop those facts in any state court proceeding. In fact, the record shows only that he contended the trial court abused its discretion in failing to consider all the relevant factors when deciding whether to dismiss a prior strike conviction. Hence, Ramirez never developed a factual basis for an Eighth Amendment claim in state court. Moreover, in order to comply with the Ninth Circuit's order, the district court will have to hold an evidentiary hearing. Thus, the Ninth Circuit's disposition essentially orders a hearing without a determination having been made as to whether Ramirez is at fault for failing to develop the relevant facts in the first place, or if he can satisfy one of the exceptions in section 2254(e)(2). Accordingly, the Ninth Circuit's decision conflicts with the express provisions of

sections 2254(d)(2) and (e)(2), as well as this Court's relevant precedent.

This is an important question of federal law, greatly impacting the criminal justice system in California. The practical implication of leaving the Ninth Circuit's decision intact is that the Ninth Circuit will continue to order an evidentiary hearing on the facts underlying prior convictions regardless of whether the habeas petitioner raised an Eighth Amendment challenge. Consequently, many petitioners collaterally attacking state court judgments may receive evidentiary hearings to which they are not legally entitled. In light of its apparent willingness to find exceptionally rare cases of cruel and unusual punishment, the Ninth Circuit may continue to use the pending appeals of habeas petitioners with recidivist sentences to dismantle the law which this Court believed it set forth in *Lockyer v. Andrade*, 538 U.S. 63. Therefore, a writ of certiorari should issue.

C. The Ninth Circuit's Designation Of An Eighth Amendment Claim Contravenes This Court's Decision In *Lockyer v. Andrade*

Relying upon its decision in *Reyes v. Brown*, 399 F.3d 964, which in turn relied on *Ramirez v. Castro*, 365 F.3d 755, the Ninth Circuit has determined that Ramirez can make an Eighth Amendment challenge against his term of 25 years to life under California's Three Strikes Law. App. B at 2-3; App. D at 21. However, this type of habeas claim is foreclosed by this Court's decision in *Lockyer v. Andrade*, 538 U.S. 63.

In *Lockyer v. Andrade*, 538 U.S. 63, this Court held that the state court's affirmation of Andrade's two consecutive terms of 25 years to life in prison was neither contrary to, nor an unreasonable application of, this Court's clearly established Eighth Amendment jurisprudence. *Id.* at 73-74, 77. In support of that holding, this Court explained that a gross disproportionality principle under the Eighth Amendment

applies to a sentence for a term of years, that the principle reserves a constitutional violation for only the exceedingly rare and extreme case, and that this Court has not established a clear path for courts to follow in determining whether a particular sentence for a term of years violates the Eighth Amendment. *Lockyer v. Andrade*, 538 U.S. at 72-73.

In *Ramirez v. Castro*, 365 F.3d 755, the decision which the Ninth Circuit relied on in deciding *Reyes v. Brown*, 399 F.3d 964, the court held a sentence of 25 years to life under California's Three Strikes Law for a third shoplifting offense raised an inference of gross disproportionality when compared to the gravity of his most recent offense and criminal history. *Ramirez v. Castro*, 365 F.3d at 767. As observed in *Reyes v. Brown*, the court in *Ramirez v. Castro* looked past the definitions of the prior offenses, to the factual specifics of the crimes, in order to decide whether the sentence was justified by the prior offenses. *Reyes v. Brown*, 399 F.3d at 969. In *Ramirez v. Castro*, the court minimized the gravity of Ramirez's prior crimes, focusing on what the court characterized as the absence of force in his prior robbery-by-force offenses (one offense involved Ramirez running over a security guard's foot and the other involved him pushing a security guard as he was leaving a store). *Ramirez v. Castro*, 365 F.3d at 768-69.

As is plainly evident, the decisions in *Reyes v. Brown*, 399 F.3d 964, and *Ramirez v. Castro*, 365 F.3d 755, are driven by the notion that a federal habeas court's role is to determine whether a sentence properly imposed under California's Three Strikes Law is justified by the gravity of the offense, considering the nature of the triggering offense as well as the facts underlying the prior strike offenses. *See Reyes v. Brown*, 399 F.3d at 971 (Tallman, J., dissenting) (individual judges chafe at this Court's decisions in *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63). That notion, however, is based on a fundamental misconception of this Court's decision in *Lockyer v. Andrade*.

The implicit holding in *Lockyer v. Andrade*, 538 U.S. 63, is that a federal habeas court cannot find a state court ruling, which upholds an Eighth Amendment challenge to a sentence that is properly imposed under California's Three Strikes Law, to be contrary to or an unreasonable application of this Court's clearly-established precedent. This is so for a simple reason. Assuming the prior strikes were the most minor of the serious or violent felonies enumerated in the law (Cal. Penal Code §§ 667.5(c) and 1192.7(c)), and assuming the triggering offense was one of the least serious felonies under California's Penal Code, it would mean that the priors were at least residential burglaries and the triggering offense was petty theft with a prior theft-related offense. However, that is the precise scenario considered by this Court in *Lockyer v. Andrade*. Nevertheless, despite the fact that in *Lockyer v. Andrade* there was the additional aggravating factor of two triggering offenses which resulted in consecutive sentences or 50 years to life, this Court held that the state court decision, which relied on *Rummel v. Estelle*, 445 U.S. 263 (1980), was neither contrary to, nor an unreasonable application of, this Court's controlling precedent.

In other words, if *Lockyer v. Andrade*, 538 U.S. 63, did not involve an unreasonable application of this Court's precedent, then no state-court analysis of a sentence that comports with California's Three Strikes Law could be contrary to, or involve an objectively unreasonable application of, this Court's Eighth Amendment jurisprudence. This would be true even if the federal court conducted a de novo review due to a state court making factual mistakes in its analysis. The federal court would still be bound to analyze the result. Any holding to the contrary would constitute a dismantling of *Lockyer v. Andrade*. Stated differently, if, in the course of considering an Eighth Amendment challenge to a sentence properly imposed under California's Three Strikes Law, a federal court were to consider the circumstances of a prior strike, the court would necessarily be reduced to acting in equity, i.e., making an independent

determination as to the rightness of the sentence, rather than acting as a habeas court, i.e., determining whether the state court analysis failed to comply with this Court's precedents.

Furthermore, there is no Supreme Court authority allowing a habeas court to look past a state's definition of crimes, to determine whether they involved violence or not, in order to evaluate the seriousness of prior strike convictions. To the extent that the Ninth Circuit in *Reyes v. Brown*, 399 F.3d 964, found authority to do so in *Solem v. Helm*, 463 U.S. 277, the court is incorrect. *Solem v. Helm* held nothing of the sort. All *Solem v. Helm* did was look to the state's definition of the elements of the prior offenses. Such an approach is also arguably inconsistent with *Rummel v. Estelle*, 445 U.S. at 271-72, 284-85, where this Court explained that the strength of a state's interest in dealing with criminal recidivists is not necessarily affected by the presence or absence of violence during the commission of offenses.

Additionally, to the extent that the Ninth Circuit's opinion in *Reyes v. Brown*, 399 F.3d 964, can be traced to this Court's decision in *Ewing v. California*, 538 U.S. 11, via the Ninth Circuit's opinion in *Ramirez v. Castro*, 365 F.3d 755, any reliance on *Ewing v. California* is misplaced. *Ewing v. California* involved a grant of certiorari following direct appeal. Thus, in *Ewing v. California*, this Court considered the pure Eighth Amendment question of whether Ewing's sentence constituted cruel and unusual punishment, and no deference was owed to any state court decision. In contrast, the instant case is a matter of habeas review. Accordingly, *Lockyer v. Andrade*, 538 U.S. 63, not *Ewing v. California*, controls. Further, *Ewing v. California* was a plurality decision of three Justices, with two others joining only the judgment – one on the grounds that the Eighth Amendment only concerns modes of punishment, and the other on the grounds that the Eighth Amendment does not contain a proportionality principle. Consequently, *Ewing v. California* has little, if any, precedential value regarding the

federal habeas corpus review of an Eighth Amendment challenge to a sentence under California's Three Strikes Law.

This is a matter of great importance to the criminal justice system in California. As previously discussed, *Lockyer v. Andrade*, 538 U.S. 63, expressly held that an Eighth Amendment challenge to a recidivist sentence would be viable only in an exceedingly rare case, and implicitly held that a state court analysis of a sentence properly imposed under California's Three Strikes Law could not be contrary to, or involve an unreasonable application of, this Court's Eighth Amendment jurisprudence. Nevertheless, in the two years since this Court issued its decision in *Lockyer v. Andrade*, the Ninth Circuit has identified three cases which it feels potentially qualify as exceedingly rare, i.e., *Reyes v. Brown*, 399 F.3d 964, *Ramirez v. Castro*, 365 F.3d 755, and the instant case. The Ninth Circuit's willingness to find so many exceedingly rare cases in such a short period of time clearly reveals that some judges of the Ninth Circuit either choose not to apply *Lockyer v. Andrade* or misunderstand that decision.

In short, it appears that the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinion concerning habeas review of Eighth Amendment challenges in California. Thus, the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. If left unchecked, the decision in the instant matter will encourage unprincipled federal habeas review of numerous sentences in California. If the state's independent power to articulate societal norms through its criminal law is to be respected, more consideration must be shown than is apparent in the Ninth Circuit's decision. Therefore, a writ of certiorari should issue.

CONCLUSION

For the aforementioned reasons, the petition for writ of certiorari should be granted.

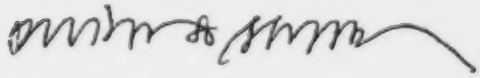
Dated: December 5, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General



QUISTEEN S. SHUM
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

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APPENDIX A

APPENDIX A

[Filed May 13, 2005]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND RAMIREZ, Petitioner-Appellant, v. CAL TERHUNE, Director of California Department of Corrections; et al., Respondent-Appellees.	No. 01-55624 D.C. No. CV-00-00195-VAP **JUDGMENT**

Appeal from the United States District Court for the Central District of California, Riverside.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Riverside and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **VACATED** and REMANDED.

Filed and entered Friday, May 13, 2005

APPENDIX B

APPENDIX B

[Decided May 13, 2005]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND RAMIREZ, Petitioner-Appellant, v. CAL TERHUNE, Director of California Department of Corrections; et al., Respondent-Appellees.	No. 01-55624 D.C. No. CV-00-00195-VAP **OPINION**

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge Presiding

Submitted May 9, 2005*

Decided May 13, 2005.

Before: Harry Pregerson, William C. Canby and
Sidney R. Thomas, Circuit Judges

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* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

MEMORANDUM**

Raymond Ramirez appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas petition, which challenged his sentence under California's three-strikes law for possession of methamphetamine. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we vacate and remand.

This court granted a Certificate of Appealability on the issue of whether Ramirez's 25-years-to-life sentence for possession of 0.29 grams of methamphetamine constitutes cruel and unusual punishment under the Eighth Amendment. We vacate the district court's judgment and remand to the district court for consideration of Ramirez's Eighth Amendment claim under *Reyes v. Brown*, 399 F.3d 964 (9th Cir.2005).

VACATED and REMANDED.

**This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

APPENDIX C

APPENDIX C

[Filed March 4, 2005]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANTOS L. REYES, *Petitioner-Appellant,* v. JILL BROWN,* Warden *Respondent-Appellee.*	No. 01-57130 D.C. No. CV-00-00608-VAP **OPINION**

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge Presiding

Argued and Submitted
March 7, 2002 – Pasadena, California
Submission Withdrawn April 2, 2002
Resubmitted April 17, 2003

Filed March 4, 2005**

Before: Harry Pregerson, Raymond C. Fisher and
Richard C. Tallman, Circuit Judges

Opinion by Judge Pregerson;
Dissent by Judge Tallman

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* Jill Brown is substituted for J.S. Woodford, her predecessor as Warden of San Quentin State Prison. *See* Fed. R.App. P. 43(c)(2).

**This case was originally the subject of a memorandum disposition filed December 29, 2003. *See Reyes v. Woodford,* 83 Fed. Appx. 985 (9th Cir.2003). On January 12, 2004, Reyes filed a petition for panel rehearing and rehearing en banc. In an order filed contemporaneously with this opinion, we grant the petition for panel rehearing; withdraw the December 29, 2003, memorandum disposition; and deny the petition for rehearing en banc as moot.

SUMMARY

Criminal Law and Procedure/Sentencing

The court of appeals vacated a judgment of the district court. The court held that a 26-year "Three Strikes" sentence for being convicted of perjury for making misrepresentations on a driver's license application might present the "exceedingly rare" case in which an Eighth Amendment challenge could be viable.

After unsuccessfully pursuing state relief, appellant California state prisoner Santos Reyes brought a 28 U.S.C. § 2254 habeas action in federal district court challenging his sentence of 26 years to life under California's Three Strikes law. Reyes' third strike was a perjury conviction for making misrepresentations on a California Department of Motor Vehicles (DMV) driver's license application. Reyes contended that his punishment violated the Eighth Amendment's prohibition on cruel and unusual punishment. Reyes' first strike was a conviction for a residential burglary he committed when he was 17 years old; he was sentenced to two years at the California Youth Authority and was paroled after one year. Reyes' second strike was a 1987 conviction for armed robbery for which he was sentenced to nine years, five of which he served; the record did not reveal the circumstances under which this felony was committed. The district court denied Reyes' habeas petition.

Reyes appealed.

[1] Applying the Antiterrorism and Effective Death Penalty Act in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004), the Ninth Circuit recognized that Eighth Amendment challenges to Three Strikes sentences remain viable in certain "exceedingly rare" cases. [2] In *Ramirez*, the Ninth Circuit concluded that Ramirez' sentence did not match the gravity of the triggering offense, given that his most recent offense consisted of the

nonviolent shoplifting of a VCR. The Ninth Circuit's reasoning that Ramirez' conduct did not threaten grave harm to society applied here, where Reyes' act of falsifying a driver's license application was not a crime targeted at another individual.

[3] As to Reyes' first strike, Reyes' age and the fact that the offense appeared to be nonviolent weighed against finding this to have been a grave offense sufficient to justify his 26 years to life sentence. [4] The sticking point came from Reyes' 1987 conviction for armed robbery. [5] Unfortunately, the circumstances under which Reyes committed the robbery were not sufficiently developed in the record for a determination of whether the offense was a crime against a person or involved violence. Moreover, given that Reyes' first strike was earned as a juvenile, the gravity of his offenses in total rested heavily on his 1987 armed robbery conviction. More facts would help determine the true weight of the offense. Accordingly, the district court's denial of Reyes' habeas petition had to be vacated and the case had to be remanded for the district court to develop the record further and to determine in the first instance whether Reyes was entitled to relief under *Ramirez*.

Judge Tallman dissented, writing that Reyes did not present an "extraordinary" rare case; he was a career criminal for whom there was no need for an evidentiary hearing.

COUNSEL

Gretchen Fusilier, Carlsbad, California, for the petitioner-appellant.
David Delgado-Rucci, Deputy Attorney General, San Diego, California, for the respondent-appellee.

OPINION

PREGERSON, Circuit Judge:

California state prisoner Santos L. Reyes brought this 28 U.S.C. § 2254 habeas action challenging his sentence under California's "Three Strikes" law. Reyes was convicted of perjury for making misrepresentations on a California Department of Motor Vehicles ("DMV") driver's license application. The perjury conviction was Reyes' third strike. He was sentenced to twenty-six years to life. Reyes contends that his punishment violates the Eighth Amendment's prohibition on cruel and unusual punishment. The district court denied Reyes' habeas petition. Because we conclude that the facts necessary to evaluate Reyes' petition were not sufficiently developed before the district court--and, therefore, are not sufficiently developed in the record before us--we vacate the district court's denial of Reyes' petition and remand to the district court for further proceedings.

I.

On September 18, 1997, Reyes entered the DMV on Waterman Avenue in San Bernardino, California. He purportedly filled out an application for a driver's license under the name of his cousin, Miguel Soto, who purportedly knew how to drive but not how to read. Reyes signed the application, which purportedly stated that the information was being provided under penalty of perjury.[1] After Reyes signed the

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1. The parties dispute whether the application Reyes signed was in English or Spanish and whether it stated that the information being provided was under penalty of perjury. For example, the State maintains that Reyes "filled out an English language application .... which stated the information was being provided under penalty of perjury." *See* Appellee's Br. at 4-5,

application, DMV employee Debra Alexander gave Reyes two copies of the written driver's license test. Alexander suspected that Reyes was cheating on the exam by using a "crib sheet." She confiscated the two tests from Reyes and began filling out paperwork related to Reyes' alleged cheating. Meanwhile, Reyes left the DMV building.

Alexander contacted California Highway Patrol Officer Jose Lopez, who was stationed at the DMV. Officer Lopez followed Reyes, who was walking away. After catching up with Reyes, Officer Lopez patted-down Reyes and handcuffed him. Reyes cooperated with Officer Lopez and voluntarily admitted that he had attempted to take the written driver's license test for Soto. The encounter was without violence.

On March 2, 1998, Reyes was arraigned on an Amended Information, charging him with one count of perjury in violation of California Penal Code § 118. Reyes qualified for the Three Strikes enhancement because of two prior convictions: one as a juvenile in 1981 for residential burglary in violation of California Penal Code § 459; and one in 1987 for armed robbery in violation of California Penal Code § 211.

The State offered Reyes a deal of four years imprisonment in exchange for a guilty plea to the perjury charge, but Reyes rejected the plea deal and exercised his constitutional right to a jury trial. On March 5, 1998, a jury convicted Reyes of the

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available at 2001 WL 34355184. In contrast, Reyes maintains that the application "was in Spanish," that he "did not know that he was signing under penalty of perjury," that he "did not know what 'perjury' meant," and that "nothing on" the Spanish application says "'I have read and understood the above.'" *See* Appellant's Opening Br. at 5-6, 8, *available at* 2001 WL 34355185. We need not resolve this dispute because it is not germane to our resolution of the instant appeal.

perjury charge and found the Three Strikes special allegations true. On April 2, 1998, the trial court sentenced Reyes to an indeterminate term of twenty-six years to life.

Reyes appealed the judgment, claiming, among other things, that his sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment. On June 9, 1999, the California Court of Appeal affirmed Reyes' conviction and sentence. On September 1, 1999, the California Supreme Court denied Reyes' petition for review.

On July 26, 2000, Reyes filed a 28 U.S.C. § 2254 habeas petition in the United States District Court for the Central District of California. On September 21, 2000, Magistrate Judge Charles F. Eick issued a report and recommendation urging that Reyes' petition be dismissed with prejudice. On October 12, 2000, District Judge Virginia Phillips adopted the report and recommendation and dismissed Reyes' petition.

On October 31, 2000, Reyes timely filed a notice of appeal and a request for certificate of appealability. On May 2, 2001, we granted Reyes a certificate of appealability on the limited issue whether his Three Strikes sentence violated the Eighth Amendment.[2]

II.

We review *de novo* a district court's decision to grant or deny a 28 U.S.C. § 2254 habeas petition. *See Rios v. Garcia*, 390 F.3d 1082, 1084 (9th Cir.2004). The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub L. No. 104-132, 110 Stat. 1214, govern

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2. Reyes subsequently filed two requests to broaden the certificate of appealability. We deny those requests in a separate unpublished order filed contemporaneously with this opinion.

Reyes' habeas petition. Under AEDPA, habeas relief is proper if the state court's adjudication of the merits of the habeas claim resulted in a decision that was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Rios*, 390 F.3d at 1084 (quoting 28 U.S.C. § 2254(d)). "A state court's decision is 'contrary to' clearly established federal law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases[,]' or (2) 'confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision and nevertheless arrives at a [different] result.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "A state court's decision is an unreasonable application of clearly established federal law if 'the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 529 U.S. at 413, 120 S.Ct. 1495).

III.

[1] Applying AEDPA in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir.2004), we recognized that Eighth Amendment challenges to Three Strikes sentences remain viable in certain "exceedingly rare" cases. *Id.* at 756, 770; *see also id.* at 763 (noting that the Eighth Amendment's "'proportionality principle' ... is applicable 'only in the "exceedingly rare" and "extreme" case'" (quoting *Lockyer v. Andrade*, 538 U.S. 63, 72-73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003))).[3] We applied the

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3. We note that the California Attorney General declined to seek further review of our decision in *Ramirez*, stating that he was acting in "the interest of justice" and calling *Ramirez* an "exceedingly rare case." Henry Weinstein, *Lockyer Gives Up Three-Strikes Case*, L.A. TIMES, Apr. 30, 2004, at B6, *available at* 2004 WL 55909787.

Supreme Court's analysis in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), to examine as an initial matter "whether [the petitioner's] extreme sentence is justified by the gravity of his most recent offense and criminal history." *Ramirez*, 365 F.3d at 768 (holding that this inquiry gives rise to an inference of gross disproportionality, which then calls for intrajurisdictional and interjurisdictional analyses).

[2] We concluded that Ramirez' sentence did not match the gravity of the triggering offense, given that his most recent offense consisted of the nonviolent shoplifting of a VCR. *See id.* Our reasoning that Ramirez' conduct did not "threaten[ ] ... grave harm to society" applies here, *id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1003, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring)), where Reyes' act of falsifying a driver's license application was not a crime targeted at another individual.[4]

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4. Signing someone else's name on a driver's license application is specifically proscribed by the California legislature as a misdemeanor. *See* Cal. Veh.Code § 20 ("It is unlawful to use a false or fictitious name, or to knowingly conceal any material fact in any document filed with the [DMV]."); *id.* § 40000.5 (classifying a Vehicle Code § 20 violation as a misdemeanor). The offense does not, however, preclude prosecution of the defendant under Penal Code § 118 for felony perjury, instead of the misdemeanor Vehicle Code section that more accurately proscribed Reyes' conduct, *see People v. Molina*, 5 Cal.App.4th 221, 231, 6 Cal.Rptr.2d 736 (1992) (holding that "Vehicle Code section 20 does not preclude perjury prosecutions for those filing false license applications under oath at the DMV"), and in this case, Reyes was convicted after trial of felony perjury. The fact that the California legislature deemed making false statements on a driver's license application to be a misdemeanor reflects that Reyes' offense "is viewed by society as among the less serious offenses." *Solem*,

We next considered Ramirez' criminal history to determine whether the extreme sentence matched his prior offenses. *See id.* at 768-769. Ramirez had been twice convicted of "second-degree robbery, i.e., willfully and unlawfully taking personal property 'by means of force and fear' in violation of California Penal Code §§ 211, 212.5(c), and 213(a)(2), a 'serious felony' under § 1192.7(c)(19)." *Id.* at 757. The first strike involved shoplifting from a grocery store, after which a get-away car driven by a third person ran over the store security guard's foot. *See id.* at 757, 768. In the second offense, Ramirez pushed a security guard away with his open hand as he ran out of K-Mart with stolen goods. *See id.* at 757, 768. Ramirez was found to have committed these offenses with "force" and was prosecuted for and convicted of "second-degree robbery," as opposed to "petty theft" (Cal.Penal Code §§ 484, 488) or "second-degree commercial robbery" (Cal.Penal Code §§ 459-61) because of the physical contact with the security guards. *Id.* at 768. Ramirez served very little time in prison for these two offenses. *See id.* at 769.

[3] In the instant case, Reyes earned his first strike for residential burglary, in violation of California Penal Code § 459, when he was seventeen years old. He was sentenced to two years at the California Youth Authority and was paroled after one year. Reyes' age and the fact that the offense appeared to be nonviolent[5/] — for which he was only required to serve two years at California Youth Authority — weigh against finding this to be a "grave" offense sufficient to justify his twenty-six years to life sentence.

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463 U.S. at 296, 103 S.Ct. 3001 (internal quotations omitted).

5. The little detail in the record suggests that Reyes was "at some guy's house with some friends and ... walked out with a radio that di dn't belong to" him. 3/4/98 Trial Tr. at 120:8-9.

[4] The sticking point in this case comes from Reyes' 1987 conviction for armed robbery in violation of California Penal Code § 211. He was sentenced to nine years of which he served five.[6/] The record does not reveal the circumstances under which this felony was committed.[7/] This conviction represents

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6. Reyes also has a history of "non-strike" offenses including petty theft; being under the influence of a controlled substance; misdemeanor DUI; and misdemeanor battery. None of these offenses appear to have involved violence, and unlike the criminal histories of the defendant in *Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), and the petitioner in *Andrade,* 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144, Reyes' criminal history became indisputably less serious over time, *see Ramirez,* 365 F.3d at 765-767 (describing Ewing's and Andrade's criminal histories).

7. The paucity of detail in the record indicates that this offense may have been non-violent. *Compare* 3/4/98 Trial Tr. at 120:17-24 (suggesting that Reyes "was stealing"--"not robbing" but "had a knife" on his person), *with Rios,* 390 F.3d at 1086 (distinguishing *Ramirez* because, during the commission of his triggering offense, "Rios struggled with the loss prevention officer and tried to avoid apprehension" and, during his prior robbery "strikes," Rios' "cohort *used* a knife" (emphasis added)).

The dissent argues that we are being unfaithful to *Ramirez* because *Ramirez* "focuses on the *presence* of a weapon, not whether, how, or where it was or was not *used*" and "Reyes ... himself, carried the weapon." Dissent at 971 n. 1 (emphasis in original). With respect to our able colleague, we believe that he is misreading *Ramirez*. *Ramirez* never refers to "the presence of a weapon." Rather, each time *Ramirez* refers to weapons, it refers exclusively to whether weapons were "involved." 365 F.3d at 757, 768, 775; *see also Rios,* 390 F.3d

a point of departure from *Ramirez,* given the nature of the offense and the nine-year prison term to which Reyes was sentenced.

However, in *Ramirez,* even though the defendant was convicted of two "serious felonies," we considered the factual specifics of Ramirez' conduct. *Ramirez,* 365 F.3d at 767 (looking past the definitions of the crimes of which Ramirez was convicted to determine whether Ramirez' conduct involved violence or was particularly serious). Although Ramirez was twice convicted of robbery "by force," we minimized the

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at 1086 (noting that Ramirez' "prior convictions were for non-violent robberies in which no weapons were *involved*" (emphasis added)). We understand *Ramirez'* use of the word "involved" to mean "engaged or employed." Webster's Encyclopedic Unabridged Dictionary of the English Language 1005 (rev. ed.1996) (defining "involve" as "to engage or employ"). Surely, involving, engaging, or employing a weapon constitutes more than the mere presence of an unused weapon.

The dissent also asserts that "*Rios* arguably weighs in favor of finding Reyes' punishment justified" because "in *Rios* ... Rios' *cohort* used a weapon," whereas here "Reyes ... *himself,* carried the weapon." Dissent at 971 n. 1 (emphasis added). We think our colleague misses the point. *If* Reyes (or an accomplice, if any) actually *used* a knife in the commission of his 1987 robbery, "an inference of gross disproportionality" would not be raised because it is the *use* of a weapon that "'threaten[s] to cause grave harm.'" *Ramirez,* 365 F.3d at 765, 768 (quoting *Harmelin,* 501 U.S. at 1002, 111 S.Ct. 2680 (Kennedy, J., concurring)). Would our dissenting colleague hold that a shoplifter caught with a small pocket-knife in his pocket necessarily committed a violent crime? In this case, the record is entirely unclear as to whether the conduct underlying Reyes' 1987 conviction involved anything more.

gravity of the offenses by noting that in the first strike offense a third person had run over the security guard's foot, resulting in a "minor injury." *Id.* And in the second strike offense, Ramirez pushed away the security guard with his hand on his way out the door. *See id.*

In *Solem,* the Supreme Court found an Eighth Amendment violation where the habeas petitioner was sentenced to life without parole for "uttering" a false check under a recidivist statute. 463 U.S. at 279-80, 103 S.Ct. 3001. He had a history of *six* nonviolent felonies, including three separate third-degree burglaries, obtaining money under false pretenses, grand larceny, and driving while intoxicated. *See id.* In considering the gravity of his offenses, the Court noted that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Id.* at 292-93, 103 S.Ct. 3001. The Court concluded that "his prior offenses, although classified as felonies, were all relatively minor. *All were nonviolent and none was a crime against a person.*" *Id.* at 296-97, 103 S.Ct. 3001 (emphasis added).[8/]

[5] In the instant case, but for Reyes' armed robbery

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8. The dissent labels Reyes a "career criminal" whose "criminal history reflects the very type and degree of recidivism the Supreme Court recognizes Three Strikes laws were properly intended to address." Dissent at 971 (citing *Rummel v. Estelle,* 445 U.S. 263, 284-85, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). But Reyes is no more a career criminal than the petitioner in *Solem,* who the Supreme Court held was entitled to habeas relief under the Eighth Amendment. *Compare* Dissent at 971 (noting that, between 1981 and 1997, Reyes committed six crimes) *with Solem,* 463 U.S. at 279-80, 103 S.Ct. 3001 (discussing Solem's six convictions for third-degree burglary, obtaining money under false pretenses, grand larceny, and driving while intoxicated).

conviction, Reyes would appear to have a plausible case for relief under *Ramirez*.[9/] Unfortunately, the circumstances under which Reyes committed the robbery are not sufficiently developed in the record for us to determine whether the offense was a "crime against a person" or involved violence. Moreover, given that Reyes' first strike was earned as a juvenile, the gravity of his offenses in total rests heavily on his 1987 armed robbery conviction. More facts, such as those on which we relied in *Ramirez,* would help determine the true weight of the offense beyond the label of the crime ("armed robbery") of which Reyes was convicted. Accordingly, we vacate the district court's denial of Reyes' habeas petition and remand for the district court to develop the record further and to determine in the first instance whether Reyes is entitled to relief under *Ramirez.*

The panel shall retain jurisdiction over this matter.

VACATED and REMANDED.

TALLMAN, Circuit Judge, dissenting:

In *Ewing* and *Andrade,* the United States Supreme Court found that California Three Strikes sentences at issue did not

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9. Our suspicion that Reyes' twenty-six years to life sentence may be grossly disproportionate to the gravity of his triggering offense and criminal history is also supported by the fact that the State offered Reyes a deal of four years imprisonment in exchange for a guilty plea to the triggering perjury charge. By offering Reyes such a heavily discounted sentence, an inference may properly be raised that the State did not view Reyes as a "danger to society" and that the State did not feel "the need to counter his threat with incapacitation." *Andrade,* 538 U.S. at 81, 123 S.Ct. 1166 (Souter, J., dissenting).

violate the Eighth Amendment prohibition on cruel and unusual punishment. *Lockyer v. Andrade,* 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), *Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). In its opinions, the Court allowed for the remote possibility of finding a statutory punishment unconstitutional when it is "grossly disproportionate." *Andrade,* 538 U.S. at 73, 123 S.Ct. 1166; *see also Ewing,* 538 U.S. at 23, 123 S.Ct. 1179 (noting that the Eighth Amendment contains a narrow "proportionality principle that applies to noncapital sentences") (internal quotations and citations omitted). The Court did not elaborate what types of violations this exception might encompass, but warned that "it is applicable 'only in the exceedingly rare and extreme case.'" *Ramirez v. Castro,* 365 F.3d 755, 763 (9th Cir.2004) (discussing *Andrade,* 538 U.S. at 72-73, 123 S.Ct. 1166). This is not one of them.

After the Court's decisions in *Ewing* and *Andrade,* the Ninth Circuit quickly found such an exceedingly rare case in *Ramirez.* Although *Ramirez* is now the law of the circuit for habeas challenges to Three Strikes sentences, its analysis is less than ideal. The *Ramirez* opinion sets forth what is, at best, a nebulous balancing test for analyzing whether a lengthy Three Strikes sentence violates the proportionality principle: whether the sentence is "justified by the gravity of [the petitioner's] most recent offense and criminal history." *Ramirez,* 365 F.3d at 768; *see also Ewing,* 538 U.S. at 29, 123 S.Ct. 1179 (noting that, when considering the gravity of the offense, the court "must place on the scales not only his current felony," but also his criminal history).

In determining the gravity of the triggering offense and criminal history, *Ramirez* instructs courts to examine the "core conduct" of the crimes and consider: (1) whether the crime

involved the use of force; (2) whether weapons were present;[1] (3) whether the crime was violent in nature; and (4) the length and type of sentence imposed. *See Ramirez*, 365 F.3d at 768-69 (discussing the factors of Ramirez's triggering offense and criminal history that were relevant in determining whether the sentence was justified).[2]

The court here declares that *Reyes* potentially presents another one of these *exceptionally* rare cases, and that an evidentiary hearing is required in order to determine whether

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1. The panel majority attempts to distinguish *Reyes* from *Rios v. Garcia*, 390 F.3d 1082 (9th Cir.2004), by focusing on the fact that Rios' cohort *used* a weapon. This sort of parsing is unpersuasive in distinguishing the two cases and also illustrates the difficulties of following precedent such as *Ramirez*. First, as unworkable as *Ramirez* is, it focuses on the *presence* of a weapon, not whether, how, or where it was or was not *used*. Second, even *Rios* arguably weighs in favor of finding Reyes' punishment justified; in *Rios*, the court found his punishment justified simply because Rios' cohort had a weapon. Reyes has no such excuse because he, himself, carried the weapon. Finally, *Rios* and the majority opinion here foretell what is to come in the wake of *Ramirez:* inconsistent outcomes in cases depending on whether individual panels choose to focus on the *presence* versus the *use* versus the *involvement* of a weapon. Surely the Eighth Amendment analysis must rely on more substantive distinctions. All three cases err in ignoring the key point that the Three Strikes Statute punishes recidivism, not subtle differences between the nature of the triggering offense or prior offenses.

2. Ramirez did not explicitly list a set of factors to consider when making this inquiry, nor did it explicitly state that this was a balancing test, leaving future panels with the unfortunate task of gleaning clear guidelines from the opinion.

Reyes' punishment violated the proportionality principle. Based on Supreme Court and Ninth Circuit precedent, I disagree with both of these propositions. However much individual judges chafe at the Supreme Court's decisions in *Ewing* and *Andrade* or the electorate's continuing and clear expression of support for tough treatment of repeat offenders, our obligation is to apply the law which the Supreme Court upheld in *Andrade* and *Ewing*.

Reyes does not present an "extraordinary" rare case; he is a career criminal. Between 1981 and 1997, he committed six crimes and spent almost seven years behind bars, five of which were passed in state prison. His criminal history reflects the very type and degree of recidivism the Supreme Court recognizes Three Strikes laws were properly intended to address. *Rummel v. Estelle,* 445 U.S. 263, 284-85, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (rejecting an Eighth Amendment challenge to Texas' recidivist statute). Furthermore, even if a narrow class of cases exist that might constitute an unusual exception, Ramirez's criminal history pales in comparison to Reyes' sixteen years of on-again, off-again criminality. I would not characterize the nature of Reyes' prior convictions as charitably as does the majority, particularly where Reyes has been convicted of battery, armed robbery, and driving while under the influence, all of which pose a potential of seriously injuring other people.

There is no need for an evidentiary hearing. While the *Ramirez* balancing test is admittedly vague, at least two of the four factors that the *Ramirez* court considered relevant weigh heavily in favor of finding Reyes' sentence justified. First, Reyes was convicted of *armed* robbery; contrary to the panel majority's inferences, this strike certainly involves at least the *presence* of a weapon during the commission of a violent crime. Second, Reyes served five years of a nine-year state prison sentence for his armed robbery conviction. Not only is this a lengthy sentence, but *Ramirez* explicitly noted that a critical

consideration in determining whether a sentence is proportionate is whether the petitioner has ever "been sentenced to [or] served any time in *state prison* prior to committing" the triggering offense. *Ramirez*, 365 F.3d at 769 (emphasis added). These facts strongly distinguish Reyes' case from *Ramirez* and justify the Three Strikes sentence imposed.

It is unclear what sorts of facts the court here anticipates will be revealed during the evidentiary hearing, or what difference they will make in the proportionality inquiry. It is also unclear what facts the district court on habeas review is permitted to revisit in its "core conduct" inquiry in the face of a final state criminal judgment that Reyes committed a robbery while armed. Because *Ramirez* sets forth a balancing test, the district court must simply determine that, in consideration of the four factors, and particularly his pattern of continuing criminal behavior, Reyes' prior time spent in state prison and his earlier conviction for armed robbery render his Three Strikes sentence for perjury justified under controlling Supreme Court precedent. There is no need for an evidentiary hearing to reach that conclusion on the record already before us.

I would deny Reyes' petition for rehearing and petition for rehearing en banc. Accordingly, I **DISSENT** from this futile remand.

APPENDIX D

APPENDIX D

[Filed November 12, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND RAMIREZ, Petitioner, v. CAL TERHUNE, Director of California Department of Corrections; BILL LOCKYER, Attorney General, State of California., Respondents.	No. 01-55624 D.C. No. CV-00-00195-VAP **ORDER**

Before: KLEINFELD and McKEOWN, Circuit Judges

We grant a certificate of appealability on the following arguable issues:

1. Does Petitioner's sentence of 25 years to life for possession of 0.29 grams (less than 0.01023 ounces) of methamphetamine violate the Eighth Amendment? *See Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., dissenting from denial of certiorari); *see also Andrade v. Attorney General of the State of California*, - F.3d -, 2001 WL 1346065 (9th Cir. Nov. 2, 2001).

2. Has Petitioner exhausted this issue? *See Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984) (exhaustion satisfied if claim presented to highest state court before this court decides the appeal).

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 14 days after the date this order is filed, Petitioner shall either (1) pay to the district court the $105.00 filing and docketing fees for this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis. Failure to pay the fees or file a motion to proceed in forma pauperis may result in automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42- 1.

Appointment of counsel would benefit the court's review. Counsel will be appointed by separate order. The Clerk shall serve a copy of this order on Maria Stratton, Federal Public Defender, 321 East Second Street, Los Angeles, CA 90012-4206 (FAX 213-894-0081), who will locate appointed counsel. The district court shall provide the Clerk of this court with the name and address of appointed counsel within 14 days of locating counsel.

If Petitioner objects to the appointment of counsel in this appeal, Petitioner shall file a written objection in this court within 14 days of the date this order is filed.

Appellant's opening brief is due January 8,2002. Appellee's brief is due February 12,2002. The optional reply brief, if any, is due within 14 days from service of the answering brief.

APPENDIX E

APPENDIX E

[Received May 14, 2001]

Raymond Ramirez
3C03-224 Low
P. O. Box 3471
Corcoran, CA 93212-3471
CDC# E-23847

IN PRO SE

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RAYMOND RAMIREZ Petitioner-Appellant, vs. CAL TERHUNE, Respondent-Appellee.	No. 01-55624 APPLICATION FOR CERTIFICATE OF APPEALABILITY: MEMORANDUM OF POINTS AND AUTHORITIES

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The petition of Raymond Ramirez respectfully shows:

1. That Petitioner made application the the Honorable Virginia A. Phillips, Judge of the United States District Court for the Central District of California, on April 4, 2000, for a writ of habeas corpus, a copy of which application is attached as EXHIBIT A, and incorporated by reference into this petition.

2. Judge Virginia A. Phillips adopted the Report And Recommendations of the Honorable Ann I. Jones, United States Magistrate Judge, dismissing with prejudice Petitioner's application for writ of habeas corpus by an order/judgment dated January 24, 2001. A copy of those documents are attached as EXHIBIT B.

3. Petitioner filed a notice of appeal with accompanying application for certicicate of appealability in the same court on February 15, 2001. A copy of those documents are attached as EXHIBIT C.

4. The detention complained of by Petitioner in his application for a writ of habeas corpus arose out of a state court conviction. Petitioner was convicted of one count of possissing less than .30 gram of methamphetamine and one count of being under the influence of methamphetamine in the Superior Court of California and was sentenced to a term of imprisonment of 25 years to life pursuant to California's "Three Strikes Law," because of Petitioner's having previously suffered two "serious felony" convictions.

5. Judge Virginia A. Phillips denied Petitioner's request for a Certificate of Appealability for the reasons stated in her order dated April 4, 2001. A copy of that order is attached as EXHIBIT D.

6. Under Federal Rules of Appeal 22(b) (as amended, 1996), it is necessary for a Certificate Of Appealability to be

issued, issue specific, before petitioner may proceed in this court from the denial of his application for a writ of habeas corpus.

7. In addition to the reasons stated in Petitioner's application for a writ of habeas corpus, a Certificate Of Appealability should be issued because in a case such as this, where a possible life sentence is in the balance, would due process and justice be served, by a determination that effects the sentence, made without equal weighing of all relevant and manditory factors?

WHEREFORE, Petitioner respectfully requests that a Certificate Of Appealability be issued on the question stated above, whether the claim presented in Petitioner's application for a writ of habeas corpus, constituted denial of a fendamentally fair hearing and his right to due process of law?

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

INTRODUCTION

Petitioner/Appellant ("Petitioner") filed federal habeas petition in the district court alleging that he was denied constitutional due process to a fundamentally fair hearing in a case where a life sentence of imprisonment hung in the balance, where the state court reviewing his motion to dismiss one or more of his prior felony conviction, for sentencing purposes, and which could result in a reduced sentence, or possibaly less

than life, the court in weighing factors as basis of its decision, failed to consider or weigh equally, all relevant and mandated factors. (See EXHIBIT A.)

Petitioner's habeas petition was denied along with application to the same district court for a certificate of appealability, stating that the habeas petition failed to state a federal claim and the trial court's refusal to strike a prior conviction did not violate due process. (See EXHIBIT D.)

Petitioner submitts to this court that the primary issue presented first to the state courts and again to the district court was not whether, the state court abused its discretion in denying Petitioner's motion to strike a prior conviction, but instead, whether Petitioner was denied a fundamentally fair hearing and thereby constitutional due process, when the state court failed to weigh all and/or equally, mandated factors in arriving at that decision. (See EXHIBIT(S) A through d.)

Standard of Review

A certificate Of Appealability ("COA") is required for a state prisoner seeking to appeal the district court's denial of relief in a habeas corpus proceeding under Title 28 U .S .C. section 2254. **(Title 28 U.S.C. section 2253 (c)(l)(A) and (B); Federal Rules of Appeal 22(b).)**

A COA may be issued only upon a "substantial showing of the denial of a constitutional right.) **(sec. 2253(c)(2).)**

A "substantial showing" is a showing that "jurists of reason would find it dabatable whether the petition should have been resolved in a different manner" or that the issue presented were "adequate to deserve encouragement to proceed further." **(Slact v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1599 (2000).)**

Where a petition is dismissed on a procedural ground there must be two determinations made, "one directed at the underlying constitutional claim and one directed at the district court's procedural holding." **(Slact v. McDaniel, 120 S.Ct. at,1600-01.)**

A petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." **Id.**

In determining whether a petitioner has "factually alleged the denial of a constitutional right," this court has held, it need "simply take a 'quick look' at the face of the complaint. **(Petrocelli v. Angelone, 242 F.3d 867 (9th Cir. 2000).)**

Federal courts may grant relief in a state prisoner's habeas, proceedings on the grounds, that petitioner's confinement violates the Constitution, law, or treaties of the United States. **(Title 28 U.S.C. section 2254(a).)**

A violation of state law is cognizable in federal court if the violation is of constitutional magnitude. **(Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir.1996); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).)**

State proceedings are cognizable if they result in fundamental unfairness and consequently violated petitioner's Fourteenth Amendment right to due process. **(Henery v. Kernan, 177 F.3d 1152, 1159 (9th. Cir. 1999); Brecht v. Abrahamson, 507 U.S. 619 (1993).)**

Discussion

Here, through Petitioner's habeas petition, his traverse to Respondent's Return, his objections to the Honorable Magistrate Judge's Report and Recommendation, his prior application for a Certificate Of Appealability to the district court, and all points and authorities and exhibits thereto, Petitioner has successfully made the required showing that: (1), because the claim presented in his state court proceedings, that the relevant state court failed to apply mandated process in arriving at its decision to deny Petitioner's motion to "strike" his prior convictions for sentencing purposes, and thereby making the proceedings unreliable and fundamentally unfair violating his Fourteenth Amendment right to due process, did not receive the required "adjudication on the merits" that would preclude relief in this court pursuant to section 2254(d); (2),

Petitioner's habeas petition "factually" alleges "the denial of a constitutional right" cognizable in this court (**Petrocelli v. Angelone, 242 F.3d 867, 873-74 (9th Cir. 2001)**); (3), "jurists of reason would find it debatable whether the district court was correct in its procedural ruling (**Petrocelli v. Angelone, supra, 242 F.3d at 873**), and; (4), "jurists of reason would find it debatable" whether the process by which the state court arrived at its decision to deny Petitioner's relevant motion was reliable and constituted a fundamentally fair proceeding pursuant to mandates of the Fourteenth Amendment. (**Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1600-04; see also Brecht v. Abrahamson, 507 U.S.619.**)

CONCLUSION

For the foregoing reasons this court should issue a Certificate Ff Appealability.

Dated: 5-9-01

Respectfully submitted

/s/

Raymond Ramirez
Petitioner-Appellant
IN PRO SE

APPENDIX F

APPENDIX F

[Filed April 4, 2001]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RAYMOND RAMIREZ Petitioner, v. CAL TERHUNE, Director California Department of Corrections, Respondent.	No. EDCV 00-0195 VAP (AIJ) ORDER DENYING CERTIFICATE OF APPEALABILITY

On February 15, 2001, petitioner Raymond Ramirez filed a Notice of Appeal and an Application for Certificate of Appealability. Petitioner seeks to appeal the district court's order dismissing his writ of habeas corpus with prejudice entered on January 24, 2001. The district court referred the matter to Magistrate Judge Ann I. Jones for further proceedings.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a certificate of appealability is a prerequisite to appellate review of a district court's judgment dismissing a habeas petition brought under section 2254. 28 U.S.C. § 2253(c)(1)(A) (as amended). A certificate of appealability

may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Williams v. Calderon, 83 F.3d 281, 286 (9th Cir.), cert. denied, 517 U.S. 1183 (1996). The "substantial showing" test requires that a petitioner demonstrate that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. See Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 1600 (2000).

This court dismissed the instant petition without prejudice because it failed to state a federal claim and because the trial court's refusal to strike a prior conviction did not violate due process. This decision is not one on which reasonable jurists could debate, nor are the issues adequate to proceed further.

Accordingly, the certificate of appealability shall not issue.

IT IS SO ORDERED.

DATED: April 3, 2001

/s/
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

Presented this 30th day of
March 2001, by:

/s/
ANN I. JONES

APPENDIX G

APPENDIX G

[Filed January 24, 2001]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RAYMOND RAMIREZ Petitioner, v. CAL TERHUNE, Director California Department of Corrections, Respondent.	No. EDCV 00-0195 VAP (AIJ) JUDGMENT

Pursuant to the Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: January 19, 2001

/s/
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H

[Filed January 24, 2001]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RAYMOND RAMIREZ	)	No. EDCV 00-0195 VAP (AIJ)
	)	
Petitioner,	)	
	)	ORDER ADOPTING
v.	)	FINDINGS, CONCLUSIONS
	)	AND RECOMMENDATIONS
CAL TERHUNE, Director	)	OF UNITED STATES
California Department of	)	MAGISTRATE JUDGE
Corrections,	)	
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. § 636, the court has reviewed the Petition for Writ of Habeas Corpus, all of the records herein, the attached Report and Recommendation of United States Magistrate Judge and the objections to the Report and Recommendation which have been filed herein. The court concurs with and adopts the findings and conclusions of the Magistrate Judge after having made a de novo determination of the portions to which objections were directed.

IT IS ORDERED that Judgment be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation, and the Judgment herein by United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY

DATED: January 19, 2001

/s/
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX I

APPENDIX I

[Filed December 27, 2000]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAYMOND RAMIREZ	)	No. EDCV 00-0195 VAP (AIJ)
	)	
Petitioner,	)	
	)	REPORT AND
v.	)	RECOMMENDATION OF
	)	UNITED STATES
CAL TERHUNE,	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" ("Petition") on April 4, 2000. Cal Terhune, Director of the California Department of Corrections ("Respondent"), filed a return on September 11, 2000. Petitioner filed a traverse on September 28, 2000. The matter is now deemed submitted and ready for decision.

BACKGROUND

A brief summary of facts is sufficient for this review, Around 9:00 p.m. on September 30, 1995, petitioner arrived at the Western Inn in Ontario, California. (Respondent's Lodgement No. 6 at 2). Petitioner briefly walked into the lobby of the motel, and left. (Id. at 2-3). Petitioner then walked to a telephone booth, and then began walking down the sidewalk. (Id. at 3). Two officers on bicycles approached petitioner while he walked and asked to speak with him. (Id.) One of the officers observed that petitioner's speech was rapid, his eyes were dilated and his lips were dry and caked. (Id.) Believing that petitioner was under the influence of a controlled substance, the officer asked if petitioner had used any speed or cocaine. (Id.) Petitioner admitted that he had used methamphetamine within the last few hours. (Id.)

The officers arrested petitioner for being under the influence of a controlled substance. (Id.) During a pat-down search, officers discovered in his pants pocket a plastic baggie containing .29 grams of amphetamine. (Id.) Later blood tests revealed the presence of both amphetamine and methamphetamine. (Id.) This result was consistent with petitioner's admission to having consumed methamphetamine within hours of being stopped. (Id.)

On November 1, 1995, petitioner was charged in count one with felony possession of methamphetamine and in count two

of being under the influence of methamphetamine. (Respondent's Lodgement No. 3 at 2; Respondent's Lodgement No. 4 at 1). The information also alleged that petitioner had suffered two prior strike convictions within the meaning of California's "Three Strikes Law."[1/] (Id.)

On March 20, 1996, a jury found petitioner guilty on both counts and determined the allegations concerning petitioner's prior strike convictions to be true. (Respondent's Lodgement No. 3 at 2-3; Respondent's Lodgement No. 4 at 1-2). On May 15, 1996, the trial court sentenced petitioner to state prison for twenty-five years to life on count one, and to 152 days in county jail on count two. (Respondent's Lodgement No. 3 at 3).

In an unpublished opinion filed on July 30, 1997, the California Court of Appeal affirmed the conviction, but reversed the sentence based on the trial court's erroneous belief that it did not have the discretion to dismiss a strike on its own initiative. (Respondent's Lodgement No. 4 at 2). The Court of Appeal remanded the case for resentencing. (Id.)

On December 19, 1997, the trial court denied petitioner's motion to strike the priors and re-sentenced petitioner to twenty-five years to life on count one, and to 152 days in county jail on count two. (Respondent's Lodgement No. 4 at 2).

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1. California Penal Code sections 667 (b)-(i), 1170.12 (a)-(d).

In an unpublished opinion filed on July 30, 1997, the California Court of Appeal affirmed the conviction. (Respondent's Lodgement No. 6). The California Supreme Court denied the petition for review on September 22, 1999. (Respondent's Lodgement No. 8.)

STANDARD OF REVIEW

A petition for writ of habeas corpus may only be granted to one who is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241, 2254. State law errors are not cognizable on federal habeas corpus. Estelle v. McGuire, 502 U.S. 62, 67, 112 S . Ct. 475, 480 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 874 (1984).

In addition, the Antiterrorism and Effective .Death Penalty Act ("AEDPA") imposes new requirements for the granting of habeas relief:[2/]

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with the respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision

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2. Because the petition was filed after April 24, 1996, the AEDPA's effective date, it is subject to the AEDPA's provisions. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 2068 (1997).

> that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d) (1997) (as amended) ("section 2254(d)").

A state court decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in U.S. Supreme Court cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. Williams v. Taylor, __ U.S. __, 110 S. Ct. 1495, 1523 (2000).

A state court decision makes an unreasonable application of Supreme Court precedent if it identifies the correct governing legal rule from Supreme Court cases but unreasonably applies it to the facts of the particular state prisoner's case or either unreasonably extends a legal principle from the Court's precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. Williams, 120 S. Ct. at 1523. The Ninth Circuit has held that, under Williams, "in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous." Van Tran v. Lindsey, 212 F.3d

1143, 1149 (9th Cir. 2000), pet. for cert. filed, 69 U.S.L.W. 3156 (Aug. 11, 2000); see also Weighall v. Middle, 215 F.3d 1058 (9th Cir. 2000).

DISCUSSION

I. The Sole Issue Raised in this Petition Does Not Merit Habeas Relief.

Petitioner alleges that the trial court abused its discretion and violated due process when it refused to dismiss one of his prior "three strike" convictions. (Petition ¶ 10(a) at 6). Petitioner specifically complains that the trial judge failed to "properly consider all of the relevant factors" when considering whether to dismiss a strike prior under Cal. Penal Code § 1385 and People v. Superior Court (Romero), 13 Cal.4th 497 (1966). (Petition, 6(a)).

Petitioner's challenge to the state court's application of California sentencing law does not present a federal question. Campbell v. Blodgett, 997 F.2d 512, 522 (9th Cir. 1993) (failure by state court to fulfill statutory mandate regarding sentencing not cognizable in federal habeas proceeding), cert. denied sub nom. Campbell v. Wood, 510 U.S. 1215 (1994); see also Cacoperdo v. Demontheses, 37 F.3d 504, 507 (9th Cir. 1994), cert. denied, 514 U.S. 1026 (1995). Nor is the California Court of Appeal's refusal to reverse petitioner's sentence reviewable in federal habeas. Hendricks v. Zenon, 993 F.2d 664, 674 (9th Cir. 1993).

Further, even if petitioner's claim were cognizable, petitioner's due process objection is without merit. The California Court of Appeal, after reviewing the transcript of petitioner's re-sentencing hearing, concluded that the trial court had not abused its discretion in refusing to dismiss petitioner's prior strike conviction findings. (Respondent's Lodgement No. 6 at 4). Specifically, the Court of Appeal noted that the trial court properly considered the factors pursuant to Cal. Penal Code section 1385.[3/] (Id. at 4, 6). Specifically , the trial court acknowledged the relatively minor character of the present offense, heard argument regarding the probation officer's recommendation to dismiss one of the strikes, considered the facts and circumstances of the prior strike convictions, including two recent: first degree burglary convictions, which were extremely serious offenses, and examined petitioner's entire background, including his continuous criminal conduct since 1994, his limited time out of custody, and his poor

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3. In deciding whether to strike a prior conviction finding, the trial court must consider "whether, in light of the nature and circumstances of the present felonies and prior serious and/or violent felony convictions," and the particulars of the defendant's "background, character and prospects,". the defendant should be treated as though he had not been previously convicted. And, the court "must set forth its reasons," for so finding. Id. (Respondent's Lodgement No. 6 at 4-5 (citing People v. Williams, 17 Cal. 4th 148, 161 (1998))).

prospects for rehabilitation and the likelihood of future criminal behavior. (Id. at 5-6; Respondent's Lodgement No. 2 at 2-7; Respondent's Lodgement No. 3 at 2-7).

As found by the California Court of Appeal, the trial court did not abuse its discretion when it rejected petitioner's request to dismiss one or more of his prior strike conviction findings. (Id.) This conclusion is neither contrary to, nor an unreasonable application of, federal law. See Richmond v. Lewis, 506 U.S. 40, 50, 113 S. Ct. 528, 536 (1992) (state violates due process only if a sentencing error has taken place, and that error is so arbitrary and capricious as to rise to a level of fundamental unfairness); cf. Spencer v. Texas, 385 U.S. 554, 565-66, 87 S. Ct. 648, 654-55 (1967) (due process does not prevent states from enacting habitual offender statutes and from admitting evidence during trial tending to prove allegations required under statutory scheme). As there was no sentencing error in this case, petitioner's claim of a due process violation must fail.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing the action with prejudice.

DATED: December 26, 2000.

/s/

ANN I. JONES
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX J

APPENDIX J

[Filed July 16, 1999]

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. **RAYMOND RAMIREZ,** Defendant and Appellant.	E022593 (Super.Ct.No.FWV08445) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Jeffrey King, Judge. Affirmed.

Robert L. Swain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert Anderson, Acting Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, and Susan E. Miller, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of possession of methamphetamine in count 1 (Health & Saf. Code, § 11377, subd. (a)) and of being under the influence of methamphetamine

in count 2 (Health & Saf. Code, § 11550, subd. (a)). The jury additionally found true the allegations that defendant had been convicted of two prior serious or violent felonies. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)[1/] The court sentenced defendant to 152 days in county jail for count 2 with credit for time served, and to the indeterminate term of 25 years to life for count 1. Defendant appealed, and the court affirmed the conviction but remanded the case for the court to exercise its discretion under *Romero*.[2/] We take judicial notice of the record in that appeal, E018425.

The court held a hearing to determine whether it should dismiss one or more of defendant's prior strike conviction findings. After the hearing, the court declined to dismiss any strikes and resentenced defendant to 25 years to life for count 1. On appeal, defendant contends that the court abused its discretion by failing to properly consider all of the relevant factors. We determine that the court considered all relevant factors and did not abuse its discretion.

FACTS

Officers Michael Bors and Douglas Reed of the Ontario City Police Department were on bicycle patrol on September

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1. All further statutory references will be to the Penal Code unless otherwise indicated.

2. *People* v. *Superior Court (Romero)* (1996) 13 Cal.4th 497.

30, 1995. At about 8:57 p.m., Officer Bors saw a red Camaro drive into the parking lot of the Western Inn in Ontario. Defendant got out of the car and walked into the lobby of the hotel. After 30 seconds, defendant left the hotel and walked to a telephone booth. After he left the phone booth, defendant began walking on the sidewalk.

The officers rode their bicycles toward defendant and asked him whether he would be willing to speak to them. Defendant stated he would not mind talking to them. While speaking with defendant, Officer Bors noted that defendant's speech was rapid, his pupils were dilated and his lips were dry and caked. The officer believed defendant might be under the influence of a controlled substance and asked defendant if he had used any speed or cocaine. Defendant replied that he had used methamphetamine within the last couple of hours.

The officers arrested defendant for being under the influence of a controlled substance. During a pat-down search pursuant to the arrest, officers discovered a plastic baggie containing .29 grams of amphetamine in defendant's pants pocket.

A sample of defendant's blood revealed the presence of both amphetamine and methamphetamine. The blood sample and defendant's symptoms were consistent with defendant's statement that he had consumed methamphetamine about two hours before he was stopped.

DISCUSSION

Dismissal of Strike

Defendant contends that the court failed to properly consider all the relevant factors when deciding whether to dismiss the prior strike findings. When this court received the record in this case, it became apparent upon reading the reporter's transcript that a part of the hearing on the request to dismiss the strike had occurred in the morning and had not been transcribed as a part of the record on appeal. This court informally contacted the superior court clerk and requested that the transcript be sent to both appellate defense counsel and the Attorney General was well as this court. We additionally had to request that the supplemental probation officer's report, which is part of the normal record on appeal, be transmitted to this court. Now that the record is complete, it is apparent that the court considered all relevant factors.

Defendant contends that the trial court did not consider the minor character of his present offense, which was the possession of a small amount of amphetamine. That offense is a wobbler. Defendant argues that the court focused only on his past record and did not consider the supplemental probation officer's report which recommended striking one of the prior convictions.

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the

Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the court's decision for an abuse of discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309.) Defendant must demonstrate that the court's exercise of discretion was irrational or arbitrary. We affirm if the court considered the relevant factors and exercised its discretion within the spirit of the law. *(Id.*, at pp. 309-310.)

During the hearing, the court noted the minor character of the present offense, which is a wobbler. The court also remarked that there was no violence involved in the present offense. The defense attorney argued that the supplemental probation officer's report recommended that the court dismiss

one of the strikes. Thus, the court was aware of the report, and we may presume the court considered it. (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.)

The court looked at the facts and circumstances of the prior strike convictions as well. The court commented that defendant had two recent first degree burglary convictions, and a prior drug-related felony conviction. The court commented that first degree burglaries are extremely serious offenses and noted that all of defendant's other offenses were minor drug-related convictions. The court then asked for the facts of the prior burglaries in order to more closely determine defendant's background and history. The court learned that one of the burglaries involved an indecent exposure.

Additionally, the court examined defendant's background, which included the fact that defendant has engaged in continuous criminal conduct since 1984 and has spent limited time out of custody. He was on parole at the time he committed the present offense.

The court examined defendant's character including the fact that defendant was a recidivist offender who had committed two burglaries, one of which involved indecent exposure, and who was a chronic drug abuser. Defendant did not avoid violating the law even when on parole.

Finally, defendant' prospects are poor. His continual drug abuse has led in the past, and most likely will lead in the future,

to repeated crimes such as the burglaries. The court noted that it was denying the request to dismiss the strikes in order to protect society, deter others from committing crimes and to prevent defendant from committing new crimes.

It therefore appears that the court examined all of the relevant factors in determining not to dismiss one or more of the prior strike conviction findings. Although the current offense was minor and did not involved violence, defendant's prior offenses, his background, his character and his prospects weigh against the dismissal of a prior strike conviction. Defendant may not be deemed outside the spirit of the three strikes law. The court did not abuse its discretion in refusing to dismiss one or more of the prior strike conviction findings.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION

/s/ Ramirez
P. J.

We concur:

/s/ McKinster
J.

/s/ Ward
J.